Supreme Court, U.S.
FILED
AUG 19 1985
JOSEPH F. ... JR.
CLERK

No. 85-2

In the Supreme Court of the United States

October Term, 1985

CHARLES J. ALLEN,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN E. FEATHER, JR.
Assistant District Attorney
Pa. Attorney No. 15756
Attorney for Respondent

Room 402, Municipal Building
400 South Eighth Street
Lebanon, PA 17042
(717) 274-2801, Ext. 376

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

BEST AVAILABLE COPY

STATEMENT OF QUESTION INVOLVED

A. Whether the Constitutional provisions against double jeopardy prohibit criminal prosecution for simple assault, criminal trespass and rape to continue after the same actor has been found to be in contempt of a court's previous order entered under the Pennsylvania Protection From Abuse Act, when those criminal charges are based upon the same conduct or episode as the contemptuous conduct?

TABLE OF CONTENTS

	Page
Statement of Question Involved	i
Counter-Statement of the Case	1
Argument	4
Relief Requested	15

TABLE OF CITATIONS

Cases:

Abbate v. United States, 359 U.S. 187, 3 L.Ed. 2d 729, 79 S.Ct. 666 (1959) 8, 9

Bartkus v. Illinois, 359 U.S. 121, 3 L.Ed. 2d 684, 79 S.Ct. 676 (1959) 9

Blockburger v. United States, 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932) 12, 13, 14

Cipolla v. Cipolla, 264 Pa. Superior Ct. 53, 398 A.2d 1053 (1979) 10

Commonwealth v. Marcone, 487 Pa. 572, 410 A.2d 759 (1980) 5

Commonwealth v. Maurizio, 496 Pa. 584, 437 A.2d 1195 (1981) 10

Commonwealth v. Mayberry, 459 Pa. 91, 327 A.2d 86 (1974) 5, 10, 14

Commonwealth v. Potter, 478 Pa. 251, 386 A.2d 918 (1978) 6

Missouri v. Hunter, U.S. , 74 L.Ed. 2d 535, 103 S.Ct. 678 (1983) 7

North Carolina v. Pearce, 395 U.S. 711, 23 L.Ed. 2d 656, 89 S.Ct. 1072 (1969) 6, 7

People v. Gray, 69 Ill. 2d 44, 370 N.E. 2d 797 (1977), cert. denied sub. nom. Illinois v. Gray, 435 U.S. 1013 (1978) 12, 13

United States v. Mirra, 220 F. Supp. 361 (S.D. N.Y. 1963) 9

United States v. Tateo, 377 U.S. 463, 12 L.Ed. 2d 488, 84 S.Ct. 1587 (1964) 6

STATUTES:

18 Pa. C.S.A. §107(b) and (c) 4

18 Pa. C.S.A. §3103 2

Pennsylvania Crimes Code at Section 110, 18 Pa. C.S.A. §110 14

Protection From Abuse Act, 35 P.S. §10181 ..... 1, 11

Protection From Abuse Act, 35 P.S. §10189 ..... 7, 13

Protection From Abuse Act, 35 P.S. §10190 2

Rules of Criminal Procedure, 327 A.2d at 93 5

COUNTER-STATEMENT OF THE CASE

This petition is based upon a decision of the Pennsylvania Supreme Court which reversed in part and affirmed in part an order of the Superior Court of Pennsylvania which in turn had reversed in part and affirmed in part the Court of Common Pleas of Lebanon County—Criminal Division which denied the defendant's omnibus pretrial motion to quash charges of simple assault, criminal trespass and rape filed against him.

The procedural history of this case begins in the Civil Division of the Lebanon County (Pennsylvania) Court of Common Pleas. On April 18, 1980, the Honorable John A. Walter, Judge entered an amicable order under the Protection From Abuse Act, 35 P.S. §10181 *et seq.*, which *inter alia*, ". . . enjoined and ordered (Charles J. Allen) to refrain from physically abusing, striking or harassing Petitioner, Julianne L. Allen, and their minor children from this time forward and for the duration of this order."

Thereafter, Mrs. Allen alleged that the defendant, Charles J. Allen, violated that protection from abuse order by forcibly entering her new residence and physically abusing her on May 7 and 8, 1980. On Friday, May 16, 1980, criminal charges of simple assault and criminal trespass were filed against the defendant. Bail was set in the amount of $1,000. On Monday, May 19, 1980 Mrs. Allen requested that the defendant be charged with con-

tempt pursuant to Section 10190 of the Protection From Abuse Act, 35 P.S. §10190. In accordance with the procedures set forth in that contempt section of the Act the defendant was brought before Judge Walter for purposes of arraignment and setting of bail. Bail was fixed at $5,000. When the defendant could not post bail, he was committed to the Lebanon County Prison. He remained there until May 28, 1980, the date set for the contempt hearing.

At the contempt hearing Mrs. Allen appeared with her attorney, Gregory Paulson, and presented testimony through herself and two other witnesses. The defendant testified on his own behalf and was represented by counsel. After the hearing Judge Walter found the defendant to be in contempt of the order of April 18, 1980. He ordered the defendant to pay the costs, a fine of $750 and discharged him from prison.

On June 3, 1980 another criminal complaint was filed against the defendant for raping his wife (see 18 Pa. C.S.A. §3103) on May 7-8, 1980, the date of the other offenses. All of the criminal charges were combined for a preliminary hearing. They were bound over for action by the Lebanon County Courts. On August 26, 1980 the defendant filed an omnibus pretrial motion to quash the information which contained the charges of simple assault, criminal trespass and rape based upon a violation of the defendant's protections under the double jeopardy clauses of the Pennsylvania and United States Constitutions. By an order and opinion dated October 8, 1980, Judge Walter, joined by President Judge G. Thomas Gates, dismissed the motion (a copy of that order and opinion is attached to Mr. Allen's petition and marked Appendix "C.")

The defendant filed a timely appeal with the Superior Court of Pennsylvania. By an order and opinion filed November 25, 1983, the Superior Court granted the defendant's requested relief regarding the simple assault charge. However, the case was remanded for trial on the charges of criminal trespass and rape. (A copy of that order and opinion, along with a dissent, is attached to Mr. Allen's petition and marked as Appendix "B.")

The defendant and the Commonwealth filed appeals in the Supreme Court of Pennsylvania. The Pennsylvania Supreme Court reversed the Superior Court's finding that prosecution of the defendant for simple assault was barred by the double jeopardy clause of the United States and Pennsylvania Constitutions. The Supreme Court affirmed the Superior Court's decision in all other respects and remanded the case for trial regarding the charges of simple assault, criminal trespass and rape. A copy of that opinion is attached to Mr. Allen's petition and marked as Appendix "A.")

The defendant's petition for writ of certiorari followed.

ARGUMENT

A. THE CONSTITUTIONAL PROVISIONS AGAINST DOUBLE JEOPARDY DO NOT PROHIBIT A CRIMINAL PROSECUTION FOR SIMPLE ASSAULT, CRIMINAL TRESPASS AND RAPE TO CONTINUE AFTER THE SAME ACTOR HAS BEEN FOUND TO BE IN CONTEMPT OF A COURT'S PREVIOUS ORDER ENTERED UNDER THE PENNSYLVANIA PROTECTION FROM ABUSE ACT WHERE THOSE CRIMINAL CHARGES ARE BASED UPON THE SAME CONDUCT OR EPISODE AS THE CONTEMPTUOUS CONDUCT

Double Jeopardy Does Not Apply

Double jeopardy does not attach to criminal contempt proceedings relative to other criminal charges that may arise out of the same conduct. The reason for this is the clear differences between criminal contempt proceedings and Pennsylvania Crimes Code violations. Criminal offenses in Pennsylvania are based upon statutory law since common law crimes were abolished with the adoption of the Crimes Code in 1973. Unless an act is proscribed by statute, it is no longer an offense, with certain exceptions, 18 Pa. C.S.A. §107(b) and (c).

On the other hand criminal contempt, the vehicle used by the courts to enforce their orders and maintain order and dignity in the courtroom, goes back centuries

to the common law. In *Commonwealth v. Mayberry*, 459 Pa. 91, 327 A.2d 86 (1974), Mr. Justice Roberts discussed the nature of criminal contempt. He stated that criminal contempt was a crime *sui generis*, unique unto itself and that there was no need to fit criminal contempt into the mold of procedures for more commonplace offenses. In *Mayberry*, supra, the defendant was appealing a trial court's finding that he had committed five (5) acts of contemptuous behavior in the presence of the trial court.

In his opinion Mr. Justice Roberts noted that unless the penalty for criminal contempt exceeds six (6) months the contemnor has no right to a jury trial. Similarly, he has no right to a preliminary hearing, nor a right to an indictment by grand jury or information and arraignment as in criminal cases covered by the Rules of Criminal Procedure. 327 A.2d at 93. Those rules of procedure apply to the penal laws of this Commonwealth.

In *Commonwealth v. Marcone*, 487 Pa. 572, 410 A.2d 759 (1980), then Justice Nix, now Chief Justice Nix, declared that "(t)he power to punish for contempt, including the power to inflict summary punishment, is not derived by statute but rather is a right inherent in courts and is incidental to the grant of judicial power under Article 5 of our Constitution. . . ." 410 A.2d at 763. In both *Mayberry* and *Marcone*, supra, the opinion writers make references to statutes passed by the legislature regarding procedure , be employed in contempt proceedings. However, the message is clear that because of its uniqueness and integral part in the power of the courts to exercise their authority and maintain dignity, the procedures for using contempt powers are ultimately reserved for the courts.

Argument

It is against that backdrop that we must determine whether the double jeopardy clause applies to criminal contempt proceedings, and if so, to what extent.

When the double jeopardy clause is applied to situations within the legal system, it is not with a literal application. An historic review of the double jeopardy clause will show that it has not always been applied to situations which might be classified as technical double jeopardy cases.

Every time a defendant who has been convicted of a crime is successful in his appeal and wins a new trial, he is being placed in jeopardy a second time for the same offense. Nonetheless, the double jeopardy clause does not ordinarily preclude re-prosecution of that defendant whose conviction has been set aside because of trial error. *United States v. Tateo,* 377 U.S. 463, 12 L.Ed. 2d 448, 84 S.Ct. 1587 (1964). In *Commonwealth v. Potter,* 478 Pa. 251, 386 A.2d 918 (1978), Mr. Justice Pomeroy wrote that "... societal interests militate against a literalistic reading of the Double Jeopardy Clause." *Tateo,* supra, stated, "... (I)t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. ...' 377 U.S. 463, 466, 84 S.Ct. 1587, 1589, 12 L.Ed. 2d 448, 451 (1964)."

North Carolina v. Pearce, 395 U.S. 711, 23 L.Ed. 2d 656, 89 S.Ct. 1072 (1969) held that the double jeopardy clause applies to three situations: second prosecutions after acquittal; second prosecutions after conviction and multiple punishments for the same offense. However, the

third situation also has been modified by a policy statement similar to *Tateo*. In *Missouri v. Hunter,* U.S. , 74 L.Ed. 2d 535, 103 S.Ct. 678 (1983), this Court stated that the double jeopardy clause is not violated regarding multiple punishments for the same offense or conduct if the legislative intent to impose them is clear. Thus, if the legislative intent is clear, the multiple punishments proscribed by *North Carolina v. Pearce,* supra, are constitutional. *Missouri v. Hunter,* supra, was dealing with multiple punishments in a single trial. Nonetheless, this Court has held that if there is no legislative intent regarding multiple punishments, the double jeopardy clause attaches and they are prohibited. If, however, there is a clear legislative intent to impose multiple punishments, the double jeopardy clause does not attach.

Compare the legislative intent cited in *Missouri v. Hunter* with the legislative intent clearly stated in Pennsylvania's Protection From Abuse Act in Section 10189, 35 P.S. §10189, Pet. App. "D"—15. That section states:

> "Unless otherwise indicated in this act, any proceeding under this act shall be in accordance with the Rules of Civil Procedure **and shall be in addition to any other available civil or criminal remedies.**" (Emphasis added.)

As such the Pennsylvania Legislature has expressed its intention that any type if proceeding under this Act shall be in addition to any other criminal or civil remedies. The Legislature knew of the serious nature of domestic violence and wanted to express its intent loud and clear.

Another example of when a literal application of the double jeopardy clause has been rejected is in cases deal-

ing with dual sovereigns. Where a single act constitutes a violation of the laws of both the state and federal governments, two prosecutions, convictions and sentences are constitutionally permissible. See *Abbate v. United States*, 359 U.S. 187, 3 L.Ed. 2d 729, 79 S.Ct. 666 (1959). The irrevocable nature of the source of the authority of the sovereign was a factor in cases such as *Abbate*, supra. The same could be said for the subject case. Because of the inherent power of the court to invoke contempt as a method to enforce its authority and protect its dignity, its *sui generis* nature makes it separate and distinct from the power of the legislature from whence criminal statutes arise.

As with the situations cited above, the Commonwealth submits that there are strong policy considerations to support a decision that the double jeopardy clause does not apply to criminal contempt cases. Distinct purposes are being achieved when contempt actions and criminal actions are instituted. The purpose of criminal contempt is to provide the courts with a method of enforcing its orders and maintaining its dignity while conducting its business. Contempt is to punish offenses against the court. The court is the victim and would become helpless quickly if it had no enforcement powers. On the other hand, the penal laws are established to maintain the peace and dignity of the people of the Commonwealth.

Similar to dual sovereignty between state and federal governments as noted in *Abbate*, supra, so also there is a dual sovereignty between the judicial and legislative branches. Co-equal branches of a government, yet with sources of authority and power that spring from different wells.

Another policy consideration is the danger of outrageous results. If Mr. Allen's attack upon his wife would have risen to the level of attempted murder and double jeopardy would attach if a contempt proceeding was instituted, the court would be powerless to vindicate the disobeyance of its order. For it would know that by even imposing the most minor of punishments upon such a violator of its protection from abuse order, it would destroy the ability of the Commonwealth to prosecute the serious offenses. Double jeopardy was designed to prevent harassment, not act as a loophole for defendants. Cf. *Abbate v. United States,* 359 U.S. 187, 3 L.Ed. 2d 729, 79 S.Ct. 666 (1959); *Bartkus v. Illinois,* 359 U.S. 121, 3 L.Ed. 2d 684, 79 S.Ct. 676 (1959).

In the Pennsylvania Supreme Court's opinion below it cited with approval *United States v. Mirra,* 220 F. Supp. 361 (S.D. N.Y. 1963). In that case Mirra was summarily found in contempt for throwing a chair at the prosecutor. In his subsequent prosecution for assault upon a federal office he pleaded the contempt conviction as a bar under double jeopardy. The *Mirra* court replied:

> "Let us consider by way of illustration the consequences of upholding Mirra's claim in the context of an extreme but not wholly improbable case that could have arisen after, and out of, Mirra's contempt conviction. Assume that Mirra's projectile had received more accurate a propulsion and had scored on its intended target—the United States Attorney. And assume further the grisly and morbid fact that the Assistant United States Attorney had sustained an injury which ultimately proved fatal. To sustain Mirra's claim would, in effect, grant a summary con-

temnor immunity from a homicide prosecution—an unconscionable result. Merely to state the case suffices to reveal what must preforce be the answer to Mirra's theory." Pet. App. "A"—24.

Jurisdiction of contempt cases arising out of the Protection From Abuse Act is in the civil division which handles those type of proceedings. Jurisdiction for crimes code violations lies in the criminal division. Since this type of contempt does not allow for a jury trial nor is there any right to a preliminary hearing, indictment, or information, the distinctions are obvious. See *Commonwealth v. Mayberry,* 459 Pa. 91, 327 A.2d 86 (1974).

The Commonwealth does concede that double jeopardy standards do apply to criminal contempt actions to a limited degree. In *Commonwealth v. Maurizio,* 496 Pa. 584, 437 A.2d 1195 (1981), and *Cipolla v. Cipolla,* 264 Pa. Superior Ct. 53, 398 A.2d 1053 (1979), the Pennsylvania Supreme and Superior Courts held that criminal contempts do have some of the characteristics of a criminal offense. Therefore, for purposes of appealing, a finding of not guilty of contempt the double jeopardy standard would apply and the decisions of the lower court in each case could not be appealed. The Commonwealth acknowledges that although criminal contempt is a crime *sui generis* and therefore unique unto itself it still demonstrates some of the characteristics of a commonplace offense. Cf: *Commonwealth v. Mayberry,* 459 Pa. 91, 327 A.2d 86 (1974). Therefore the application in *Maurizio,* supra, and *Cipolla,* supra, are correct. However, the Commonwealth sees that as a vertical application rather than a horizontal one. Vertical in the sense that within the contempt process an individual can only be called into

court one time for a particular contemptuous episode (unless a new hearing were ordered after appeal). This would be consistent with the unique treatment that should be afforded contempt.

The Commonwealth emphasizes that it had no control over the contempt action in this case. It arose out of a civil action under the Protection From Abuse Act, 35 P.S. §10181, *et seq.* Mrs. Allen and her attorney appeared at the contempt hearing and presented the case. The contempt action was instituted by the battered spouse, not the Commonwealth. Even if the Commonwealth were notified of the existence of these proceedings it would be powerless to intervene. Surely this type of situation is not the type of harassment by the Commonwealth designed to make a defendant run the gauntlet more than once. Double jeopardy does not attach.

Double Jeopardy—Different Elements Test

If this Court determines that the double jeopardy clause may be applied to criminal contempt proceedings, the Commonwealth submits that under the "different elements" test the charge of simple assault, criminal trespass and rape should be allowed to go to trial. In proving the contempt the elements are (1) knowledge of an order and (2) disobeyance of that order in some fashion. At the contempt hearing Julianne Allen had to prove that the defendant, Charles Allen, knew of the order. That could be done by judicial notice since the defendant agreed to the entry of the order. She also had to prove that the

defendant "physically abused, struck or harassed her on May 7 and 8, 1980," or in some other way violated the Court's order.

The test stated by this Court to determine whether or not two criminal charges violate the double jeopardy clause was announced in *Blockburger v. United States,* 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932). *Blockburger,* supra, stated:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304, 76 L.Ed. 306, 52 S.Ct. 180.

The Pennsylvania Supreme Court applied Blockburger to the charges of simple assault, criminal trespass and rape and found no double jeopardy problems.

In particular the Pennsylvania Supreme Court reviewed the case of *People v. Gray,* 69 Ill. 2d 44, 370 N.E. 2d 797 (1977), *cert. denied sub. nom. Illinois v. Gray,* 435 U.S. 1013 (1978). *People v. Gray,* supra, held that double jeopardy standards prohibited a prosecution for assault after an earlier finding of contempt based upon the same acts by the defendant, Gray. The Pennsylvania Supreme Court adopted the principles stated in the dissent.

> "We find the dissent in Gray persuasive. That dissent which is echoed in the trial court's opinion in this case, succinctly states the distinct elements of criminal contempt and the important functions which

> they serve. 'In the case at bar, . . . the contempt conviction only held that the defendant had willfully committed certain acts which violated the court order. (Footnote omitted.) The court order could have been violated by an otherwise legal act.' " Pet. App. "A" —19.

The Pennsylvania Supreme Court quotes a larger portion of the *Gray* dissent which outlines the essential differences between criminal contempt and ordinary criminal offenses. Pet. App. "A"—19-20. It places special emphasis upon the element of the willful disobedience of a court order. That could have been accomplished by harassing phone calls or entry upon the wife's property. The *Blockburger* "separate elements" test has been met, and a writ of certiorari to the Pennsylvania Supreme Court should not be entered.

A practical consideration in this case is that the legislative purpose of the Protection From Abuse Act would be totally lost if the victim of domestic violence must choose between the institution of a criminal charge and the immediate relief of contempt of a court order. The whole purpose of the Protection From Abuse Act was to provide prompt relief to victims of domestic violence since the criminal justice system, with all of the procedural requirements, was incapable of that task. That is why the remedies under the Act were to be ". . . in addition to any other available and or criminal remedies." 35 P.S. §10189. Pet. App. "D"—15.

Another practical consideration is the fact that the contempt action and the ordinary criminal charges couldn't be joined into a single prosecution even if that was de-

sired. A contempt defendant has no attending right to a preliminary hearing or trial by jury. *Commonwealth v. Mayberry,* 459 Pa. 91, 327 A.2d 86 (1974). The Petitioner makes reference to the compulsory joinder provisions of the Pennsylvania Crimes Code at Section 110, 18 Pa. C.S.A. §110, Pet. pp. 4-6. However, he conveniently ignored Section 107 of the Crimes Code which defines the application of Section 110. Section 107(c) states:

> "(c) Exceptions—This section does not affect the power of a court to declare forfeitures or to punish for contempt or to employ any sanction authorized by law for the enforcement of an order or a civil judgment or decree. . . ." 18 Pa. C.S.A. §107(c).

The legislative intent is reaffirmed that contempt is to be treated separately and distinctly. The legislature and both the Federal and Pennsylvania courts have recognized that criminal contempt contains separate elements of proof from the underlying criminal conduct. As the Pennsylvania Supreme Court determined, the *Blockburger* separate elements test has been met. No writ of certiorari to the Pennsylvania Supreme Court is appropriate.

RELIEF REQUESTED

The Commonwealth of Pennsylvania requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

JOHN E. FEATHER, JR.
Assistant District Attorney
Attorney for Respondent
Pa. Attorney No. 15756

Room 402, Municipal Building
400 South Eighth Street
Lebanon, PA 17042
(717) 274-2801, Ext. 376